

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matters of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provisions of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

**COMMENTS OF AT&T INC. IN SUPPORT OF VERIZON’S PETITION  
FOR LIMITED RECONSIDERATION AND IN OPPOSITION TO ARIZONA’S  
PETITION FOR CLARIFICATION AND/OR RECONSIDERATION  
OF THE TITLE I BROADBAND ORDER**

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AT&T Inc. (“AT&T”) submits these comments in support of Verizon’s Petition for Limited Reconsideration and in opposition to the Arizona Corporation Commission’s Petition for Clarification and/or Reconsideration of Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, WC Docket Nos. 02-33 *et al.* (released September 23, 2005) (“*Title I Broadband Order*”).

**INTRODUCTION AND SUMMARY**

The *Title I Broadband Order* was a pivotal event in the Commission’s implementation of its core statutory mandate to promote the rapid and efficient deployment of broadband services, *see* 47 U.S.C. § 706. In freeing facilities-based wireline broadband Internet access service providers from a host of legacy regulatory restrictions, the Commission recognized that permitting carriers to offer the transmission component of broadband Internet access on a private carriage basis would encourage customized arrangements better suited to customers’ needs, spur

broadband innovation and investment, and reduce costs. The Commission predicted that emerging competition would encourage carriers to negotiate commercially reasonable private contracts, and it thus ruled that there is no public interest justification to compel carriers to make “cookie cutter” Title II common carriage offerings that deny them maximum flexibility to meet individual customers’ specialized requirements. The Commission further found that in the current competitive environment there is no longer any reason to treat the Bell operating companies (“BOCs”) differently from competing broadband Internet access providers.

All of these findings apply with equal or greater force to other broadband services. Thus, as Verizon’s Petition explains, there is no reason for the Commission to stop half way and artificially limit its holdings to situations in which the broadband transmission is used primarily for Internet access. By granting the requested relief and extending the private carriage option to all broadband services, the Commission will greatly expand the public interest benefits it unleashed in the *Title I Broadband Order*.

More specifically, as detailed below, reflexively clinging to mandatory common carriage requirements for a subset of broadband services (and competitors) needlessly limits the flexibility and increases the costs of providing these services. Although broadband customers have long demanded a high degree of customization, the need for maximum flexibility to structure private customized arrangements has become increasingly acute as legacy frame relay and ATM services are rapidly being supplanted by next-generation IP-enabled and other high bandwidth services. A private carriage option for *all* broadband services – and all carriers – is urgently needed to allow suppliers efficiently to tailor their broadband offerings to customers’ increasingly specialized requirements.

Given the fierce competition that already ensures pro-competitive outcomes across the entire broadband services marketplace, there is no public interest basis to employ “legal compulsion” that denies carriers maximum flexibility to negotiate private customer-specific contracts. *See, e.g., NARUC v. FCC*, 525 F.2d 630, 641-642 (D.C. Cir. 1976). The Commission’s deregulation of broadband Internet access in the *Title I Broadband Order* rested, in part, on the predictive judgment that emerging competition would provide all carriers with adequate incentives “to offer broadband transmission on a commercially reasonable basis” and to “negotiate mutually acceptable rates, terms and conditions” with their customers. *Title I Broadband Order* ¶ 75. Those findings, *a fortiori*, compel similar deregulation of other broadband services that are provided in a dynamic marketplace that the Commission has repeatedly held is *already* intensely competitive.

Indeed, it is precisely because the broadband marketplace is so robustly competitive and immune from manipulation that the Commission has taken a number of steps over the years to increase carriers’ flexibility to meet broadband customers’ individualized needs. But those piecemeal reforms have, for no good reason, stopped short of full private carriage authority and, just as important, have been applied unevenly across the industry. Thus, although many providers have long operated free of the most restrictive aspects of common carrier regulation, BOCs, in particular, remain subject to outmoded legacy restrictions – including patently inappropriate dominant carrier treatment of broadband services that are provided in a fiercely competitive environment. For the same reasons the Commission identified in the *Title I Broadband Order*, the public interest is ill-served by a regime that forces competing broadband providers to operate under such radically different constraints.

For these reasons, the Commission should grant Verizon’s petition, and allow all wireline carriers, in their discretion, the opportunity to make individualized offerings of all wireline broadband transport services. And the Commission should flatly deny Arizona’s proposal to turn backwards and deny much of the broadband flexibility that the Commission just granted in the *Title I Broadband Order*. Carriers may well choose to continue to make some generalized offerings of broadband services subject to applicable Title II requirements (which should, in all cases, be limited to nondominant carrier treatment). But in today’s competitive broadband marketplace, there is no justification for maintaining a patchwork regulatory regime that selectively denies some carriers the flexibility they need effectively to serve their broadband customers.

## **ARGUMENT**

The Communications Act presumptively permits any communications provider to offer services on a private carriage basis unless it affirmatively undertakes to “hold out” its service to the public “indifferently” or is under a “legal compulsion” to do so. *NARUC v. FCC*, 525 F.2d 630, 641-642 (D.C. Cir. 1976). Thus, common carriage determinations do not – indeed, cannot – turn on a carrier’s status as a “LEC” or a “dominant” carrier, but must instead focus on “the particular practice under surveillance.” *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). Under these longstanding principles, carriers already have the option of providing many of the newest broadband services as private carriage, when such offerings are inherently tailored to individual customers and are of such limited and particularized appeal that an indifferent “holding out” would make no sense.<sup>1</sup> Verizon’s petition

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<sup>1</sup> For example, AT&T now offers a customized *10-gigabit* Ethernet service called DecaMAN that connects multiple points within a metropolitan or regional area. Such extremely high-capacity networks appeal only to the very largest enterprises (such as large businesses  
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remains critically important, however, because the *Title I Broadband Order* failed to remove legacy common carriage requirements from a number of broadband services that are increasingly taking on the characteristics of, and would be offered most efficiently as, private carriage. As detailed below, fierce competition for those services obviates any need for compelled common carriage, and eliminating that regulation will provide substantial benefits to consumers.

**I. MARKET FORCES ALREADY ENSURE COMMERCIALLY REASONABLE BROADBAND TERMS, AND THERE IS NO BASIS FOR LEGAL COMPULSION THAT DENIES ANY PROVIDER THE OPTION OF MEETING BROADBAND CUSTOMERS' NEEDS THROUGH INDIVIDUAL PRIVATE ARRANGEMENTS.**

Under the Communications Act, decisions whether to offer service through private contract or common carriage are, in appropriate circumstances, left to the carrier. “If the carrier chooses its clients on an individual basis and determines in each particular case ‘whether and on what terms to serve’ and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.” *Southwestern Bell*, 19 F.3d at 1481. And, as the *Title I Broadband Order* recognizes, “specific regulatory compulsion” that denies carriers the flexibility to respond to individualized customer requirements through private contract comes at a very high price, raising costs and prices, discouraging innovation and investment and reducing carriers’ ability to respond rapidly and effectively. For that reason, mandated common carriage can only be justified where it is abundantly clear that “marketplace incentives” will not

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connecting data centers or hospital groups transmitting medical imaging) and are custom-designed and engineered to address each customer’s specialized needs. AT&T currently has only a handful of customers for this service and forecasts that only a very limited number of very large enterprise customers will *ever* purchase the service. By their very nature, such emerging services are unique service arrangements that cannot effectively be deployed as generally available offerings.

encourage carriers to “negotiate mutually acceptable rates, terms and conditions” to meet their customers’ individualized needs.<sup>2</sup>

Moreover, in the dynamic communications marketplace – and particularly in the context of broadband services that Congress has expressly directed the Commission to encourage – the Commission must continually reassess whether existing common carriage mandates remain necessary.<sup>3</sup> “Retaining regulations longer than necessary” is, of course, always “contrary to the public interest,” *Pricing Flexibility Order*, 14 FCC Rcd. 14221, ¶ 144 (1999), but in the broadband arena, it also runs afoul of the Commission’s core section 706 mandate.<sup>4</sup>

Applying these principles in the *Title I Broadband Order*, the Commission ruled that there is no longer any public interest justification to continue to enforce the decades-old regulation of a very different era to compel a subset of carriers to provide the transmission component of broadband Internet access services on a common carriage basis. The Commission explained that “reasoned judgment tells us that sufficient marketplace incentives are in place to encourage” pro-competitive outcomes through the preferred and more flexible means of private

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<sup>2</sup> *Title I Broadband Order* ¶¶ 75, 79; see also *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (upholding the Commission’s determination that regulatory compulsion is appropriate only where the carrier “has sufficient market power to warrant regulatory treatment as a common carrier”); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (“the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances”); *Norlight Private Carriage Order*, 2 FCC Rcd. 132, ¶ 19 (1987) (“NorLight’s insignificant market power and the class of users it proposes to serve fall within the private carrier test set out in *NARUC I*”); *Transponder Sales Order*, 90 F.C.C.2d ¶¶ 31-34 (documenting the benefits of private carriage); *Detariffing Order*, 11 FCC Rcd. 20730, ¶ 52 (1996) (where services are provided in workably competitive environment, a regime without tariffs or other legacy Title II restrictions is the “most pro-competitive, deregulatory system” and will result in “market conditions that more closely resemble a competitive environment”).

<sup>3</sup> *Title I Broadband Order* ¶ 77 (“Congress mandated that the Commission encourage broadband capability”); *id.* ¶ 79 (“Fostering the ubiquitous availability of broadband” is “best accomplished by recalibrating regulation where it is appropriate to do so”).

<sup>4</sup> See also *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982) (“free market forces [should not] be supplanted by . . . regulation when neither Congress nor the [agency] has found it essential”).

contracts. *Title I Broadband Order* ¶ 79. In reaching that conclusion, the Commission “recognize[d] that, in many areas, the incumbent LEC is currently the only wholesale provider of” broadband transport to ISPs, *id.* ¶ 63, but it made a “predictive judgment” that wireline carriers would nonetheless have incentives to deal with their ISP customers on commercially reasonable terms, given existing “head-to-head” retail competition between cable and wireline providers and the likelihood that other broadband platforms would gain broader consumer acceptance “[i]n the near future.” *Id.* ¶¶ 56, 59. That predictive judgment was eminently reasonable; indeed, these are “judgments of the very sort the Commission must make if it is to avoid governing tomorrow by the standards shaped for yesterday.”<sup>5</sup>

Those same findings, *a fortiori*, demand similar treatment of other broadband services, which already are – and, indeed, have long been – subject to intense competition from many competing providers. For example, as the Commission has repeatedly recognized, enterprise customers are served by multiple competing facilities-based providers of both legacy frame relay and ATM services and of the ever-increasing array of IP-enabled and other next-generation services that are rapidly displacing these legacy services.<sup>6</sup>

More than five years ago, for example, in approving the merger of MCI and WorldCom, the Commission identified numerous providers competing head-to-head to provide frame relay, VPN and other traditional broadband transport services to “sophisticated and knowledgeable” enterprise customers.<sup>7</sup> The Commission also recognized that “barriers” to further entry are

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<sup>5</sup> *Wold Communications*, 735 F.2d at 1478; *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981).

<sup>6</sup> And DSL services, whether or not they are provided to enterprise customers or are used for Internet access, are subject to the same dynamic competitive forces the Commission identified in the *Title I Broadband Order* itself.

<sup>7</sup> *MCI-WorldCom Merger Order*, 13 FCC Rcd. 18025, ¶¶ 34, 40-42, 65; 73 & n.230 (1998); *see also Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. 14032, ¶ 121 (2000) (“a large number of  
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“low” given facilities-based providers’ wholesale provision of frame relay and ATM arrangements to highly successful systems integrators and other non-facilities-based competitors.<sup>8</sup>

Most recently, the Commission concluded in its SBC-AT&T and Verizon-MCI merger orders that competition for “high-capacity transmission services,” including Frame Relay, ATM, and Gigabit Ethernet is “robust.”<sup>9</sup> The Commission identified a wide and heterogeneous array of competitors offering these services and found “that these multiple competitors ensure that there is sufficient competition.” *SBC-AT&T Merger Order* ¶ 73 (“we find that myriad providers are prepared to make competitive offers”). Based on the detailed evidence before it, the Commission further observed that “static” analysis of existing competitors’ current shares severely misrepresents the robustly competitive nature of the marketplace, because it does “not reflect the rise in data services, cable and VoIP competition, and the dramatic increase in

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other firms” with “similar capabilities” provide both local and long distance services to business customers, and even “more firms are entering the larger business market”); *id.* ¶ 120 (“incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business market”; “there are a number of significant competitors equally competitive with Bell Atlantic and GTE in these larger business markets”); *SBC-Ameritech Merger Order*, 14 FCC Rcd. 14712, ¶¶ 89-90 (1999) (noting actual and potential competition for business customers); *AT&T-TCG Merger Order* ¶¶ 28, 37, 40 (same).

<sup>8</sup> See *MCI-WorldCom Merger Order* ¶¶ 35, 65; see also *id.* ¶ 73 n.230 (listing carriers offering broadband transport services at wholesale); <http://www.phoneplusmag.com/articles/081resl1.html> (“The big daddy of the data world, ATM service, is being sold by major network operators on a wholesale basis to carrier customers as a cost-effective backbone-building strategy”); <http://www.xchangemag.com/articles/511network4.html> (“Global Crossing’s Fast-Track Services offer wholesale customers the ability to deliver uniform services across both their own and the Global Crossing networks, matching their offers feature-for-feature, including SLAs. Services that can be extended under the program include IP VPN, dedicated Internet access, ATM, frame relay and private-line network services”); <http://www.qwest.com/wholesale/pcat/natfrs.html> (describing Qwest’s wholesale Frame Relay offer).

<sup>9</sup> *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order ¶¶ 57, 73 n.223 (released November 17, 2005) (“*SBC-AT&T Merger Order*”); see also *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, ¶ 74 (released November 17, 2005) (“*Verizon-MCI Merger Order*”).

wireless usage” or the recent entry of “[f]oreign-based companies, competitive LECs, cable companies, system integrators, and equipment vendors and value-added resellers.”<sup>10</sup>

Recent advances in IP technology and services have had a particularly dramatic and growing impact on the competitive landscape. Both “traditional” transport providers and a host of new entrants have begun to offer “IP-VPNs and other converged services.” *Verizon-MCI Merger Order* ¶ 75 n.229. “[A] growing number of enterprise customers” have begun switching services to new entrant providers, and “[t]hese new competitors are putting significant competitive pressure on traditional service providers.” *Id.* Nearly half of enterprise customers switched providers last year,<sup>11</sup> further accelerating a long trend of price reductions and service improvements by traditional providers.<sup>12</sup> And, once asymmetric and anachronistic regulatory burdens are removed, the mergers themselves are likely to “bring even more competition for these customers because the merged compan[ies] will offer a true end-to-end solution to businesses, which in turn will likely improve quality and could create cost savings.” *Id.* ¶ 75.

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<sup>10</sup> See, e.g., *SBC-AT&T Merger Order* ¶ 73 (“market shares may misstate the competitive significance of existing firms and new entrants”); *id.* ¶ 74 (finding that “system integrators and the use of emerging technologies are likely to make this market more competitive, and that this trend is likely to continue in the future”); *id.* ¶ 65 (noting “the large number of competitors already participating in this market”); Probe Group, *Control of the Enterprise Market*, at 4 (June 2004) (“The enterprise market is becoming increasingly competitive”); Yankee Group, *Network Service Providers Alter Their Business Models To Capture a Greater Share of Increasing Enterprise Budgets* (Jan. 2005) (systems integrators (or “SIs”) “are increasingly circumventing traditional providers of voice and data services and strengthening relationships with enterprise decision-makers. SIs use their powerful enterprise relationships to push carriers downstream, relegating them to a role of commoditized transport provider.”); Letter from Dee May (Verizon) to Marlene Dortch (FCC), Attachment (“Broadband Competition: Recent Developments”) at 25-26 (cable companies pose a significant competitive threat in the provision of data services to businesses of all sizes) (filed March 26, 2004).

<sup>11</sup> Yankee Group, *Network Service Providers Alter Their Business Models to Capture a Greater Share of Increasing Enterprise Budgets*, at 7 (Jan. 2005).

<sup>12</sup> IDC, *Market Analysis, U.S. Frame Relay Services 2004 – 2008 Forecast*, at 1, 6 (Dec. 2004).

In short, high capacity broadband services are unquestionably among the most competitive services in the communications marketplace. Moreover, customers who purchase these services are among the most “sophisticated purchasers of communications services.”<sup>13</sup> They use “strategic sourcing in order to exert greater control, lower costs, and increase quality.”<sup>14</sup> They routinely employ detailed and highly specialized RFPs to solicit multiple rounds of competitive bids, followed by lengthy and intense negotiations with multiple competing carriers over every term and condition of service.<sup>15</sup> Indeed, “[t]he very process of competitive bidding and contract renegotiation is often sufficient to create the perception with a vendor of a credible threat of losing an existing customer, compelling the supplier to offer lower prices and improved service to retain the customer.” *SBC-AT&T Merger Order* ¶ 74 n.226.<sup>16</sup>

It is precisely because the broadband services marketplace is so robustly competitive and immune to manipulation that the Commission has already taken numerous steps to reduce

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<sup>13</sup> *SBC-AT&T Merger Order* ¶ 75; see also *id.* ¶ 65 (noting the “high level of customer sophistication for mid-sized and large enterprise customers”); *AT&T Non-Dominance Order*, 11 FCC Rcd. 3271, ¶ 65 (1995) (finding that business customers have highly elastic demand, and that business customers routinely request proposals from multiple carriers).

<sup>14</sup> *SBC-AT&T Merger Order* ¶ 74 n.226; see also *id.* ¶ 75 (“So long as competitive choices remain in this market, these classes of customers should seek out best-priced alternatives”). Notably, the Commission found that even businesses at the smaller end of the spectrum were sophisticated purchasers that were able to play suppliers off against each other and drive down prices. *Id.* ¶ 75 n.231 (“Evidence in the record indicates that there are at least 20 consulting firms that provide communications sourcing services, and when engaged, customers are able to achieve annual reduction of 27% (relative to their pre-engagement annual spend)”).

<sup>15</sup> Because of the “bid” nature of this market, “present market share [is] an inaccurate reflection of its future competitive strength.” *FTC v. Nat’l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979). See also *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994) (it has been “many years since anyone knowledgeable about antitrust policy thought that concentration by itself imported a diminution in competition”). Instead, the relevant inquiry is “the availability of competition.” *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001); see also *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001). Here, as detailed above, competitive broadband alternatives are, to say the least, widely “available.”

<sup>16</sup> *Accord, United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (sophistication of customers is likely to ensure competition even in highly concentrated markets).

regulation and increase suppliers' flexibility to tailor services to customers' individualized requirements. More than a decade ago, the Commission allowed the legacy AT&T (then regulated as a "dominant" carrier) to offer "integrated services packages" that permitted some, albeit limited, customization of the services that it offered to enterprise customers. *Tariff 12 Order*, 6 FCC Rcd. 7039 (1991). A few years later, the Commission took the next logical step and eliminated dominant carrier regulation of legacy AT&T altogether. *AT&T Non-Dominance Order*, 11 FCC Rcd. 3271, ¶¶ 57-72 (1995). More recently, the Commission eliminated all "nondominant" carriers' tariffing obligations, observing that "with the advent of competition," these traditional Title II requirements affirmatively harm consumers, because they "discourage competitive pricing, restrict the flexibility of carriers seeking to offer service arrangements tailored to an individual customer's needs, and impose unnecessary regulatory costs." *Detariffing Second Reconsideration Order*, 14 FCC Rcd. 6004, ¶ 2 (1999). As a result, the largest providers of broadband transmission services have long enjoyed significant flexibility with few remaining Title II constraints. And, cable and other intermodal competitors have largely avoided those constraints.

But, as the Verizon Petition notes, the Commission has yet to relieve BOCs and other incumbent LECs of these same unnecessary burdens and provide them with the pro-competitive flexibility they seek to provide competing broadband services to the same customers. The Commission has specifically recognized that onerous Title II "regulation impedes [incumbent LECs] from quickly introducing new services in response to customer demands and opportunities created by technological developments," "reduces" their "ability to respond quickly to [their] competitors' advanced services offerings and tailor [their] own offerings to meet customers' individualized needs," and "diminishes" their "ability to reduce prices and

improve service in response to competitive pressures.” *ASI Forbearance Order*, 17 FCC Rcd. 27000, ¶ 26 (2003). Nonetheless, and for no good reason, incumbent LECs remain shackled with a panoply of Title II obligations, including continuing dominant carrier regulation of their local operating companies and a host of burdensome requirements dating back to the *Computer Inquiries* proceedings.

The Commission’s piecemeal deregulatory efforts, which have reduced regulation of some providers and not others, have left a fragmented marketplace in which competing providers operate under vastly different regulatory regimes and providers, to varying degrees, are denied the flexibility to meet their customers’ needs efficiently. BOCs in particular remain subject to obsolete tariffing and pricing rules that apply only to them and that greatly reduce their flexibility to the clear detriment of consumers. But, just as “[t]here is no reason to classify broadband Internet access services differently depending on who owns the transmission facilities,” *Title I Broadband Order* ¶ 16, there is no reason to subject BOC broadband transport services to more onerous regulation than applies to the numerous other providers of these highly competitive services. The marketplace imposes strong business incentives on BOCs, no less than the myriad other competing suppliers, to meet competition. The wide availability of alternative broadband offers means that any BOC’s attempt to insist upon unreasonable terms would simply drive customers to other carriers that have more than ample capacity to serve them.

These controlling marketplace facts demand that all broadband transport providers be placed on equal regulatory footing. The Commission should accordingly follow its own lead and grant all providers the option of negotiating private contracts for the provision of all broadband services when that is the most effective means of meeting customers’ needs.

Finally, the Commission must reject claims that it can continue to single out BOC and other incumbent LEC broadband providers for disparate regulatory treatment merely because they have been classified as “dominant” carriers or are alleged to have “market power” with respect to *other* services. As the Commission recognized in rejecting these very claims with respect to broadband Internet access services, “it is not necessary to make” general, or even service-specific, findings of market “non-dominance” with respect to particular carriers in order to place all carriers on an equal regulatory footing with respect to broadband services where, as here, adequate marketplace incentives exist.<sup>17</sup> As noted above, it has long been settled that compulsory common carriage must be justified with respect to “the particular practice under surveillance” and cannot be based upon a carrier’s historical treatment as a dominant carrier with respect to other services.<sup>18</sup> Here, the Commission’s repeated findings establish not only that market forces will ensure that private carriage broadband services are offered upon commercially reasonable terms but also that denying any carrier the option of using private contracts will only reduce competition and deter innovation and investment in broadband technology.<sup>19</sup>

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<sup>17</sup> *Title I Broadband Order* ¶ 84; see also *id.* ¶ 81 (in its “discretion, subject to reasoned explanation” the Commission is “free to alter the policy judgment reflected in th[e] [Computer Inquiry] requirements based on our assessment of their relevant costs and benefits in light of changed technological and market conditions”).

<sup>18</sup> *Southwestern Bell*, 19 F.3d at 1481.

<sup>19</sup> Continued disparate treatment of BOCs in the highly competitive retail enterprise broadband services marketplace manifestly cannot be justified on unsubstantiated and misguided “price squeeze” allegations that incumbent LECs have and will abuse market power in the provision of special access services that are *inputs* to these enterprise services. The Commission rejected similar claims in the *SBC-AT&T Merger Order* (¶ 55) and should do so here as well. As the Commission observed there, “where UNEs are available, they provide an alternative for special access service” and “[f]or areas where UNEs are not available . . . competing carriers have invested heavily” in “local facilities.” *Id.* In any event, as the Commission has repeatedly recognized, any “such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing.” *Cingular-AT&T Wireless Merger Order*, 19 FCC Rcd. 21522, ¶ 183 (2004). Proponents of increased regulation have had every opportunity to prove their claims of special access market power in those other proceedings. Thus, the appropriate solution is to address any legitimate special access concerns  
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**II. BROADBAND CUSTOMERS HAVE VARYING NEEDS THAT ARE BEST SERVED BY A MARKET-BASED APPROACH THAT ALLOWS ALL CARRIERS MAXIMUM FLEXIBILITY TO STRUCTURE CUSTOMIZED ARRANGEMENTS TAILORED TO THE PARTICULAR NEEDS OF INDIVIDUAL CUSTOMERS.**

The *Order* granted wireline broadband providers “flexibility and freedom to enter into mutually beneficial commercial arrangements” for the provision of the transmission component of Internet access. *Title I Broadband Order* ¶ 87. In “embrac[ing that] market-based approach,” *id.*, the Commission relied upon carriers’ representations that “their preferred means of offering wireline broadband transmission service is through customized arrangements tailored to the particular needs of requesting ISP customers,” because such arrangements – in sharp contrast to “cookie-cutter common carrier offerings” – enable more “innovative broadband offerings.” *Id.* ¶ 72.

In particular, the Commission found that the decades-old regime that mandated common carriage for the transmission component of broadband Internet access services was standing in the way of many affirmative benefits. Private carriage allows providers to “experiment” with “other types” of arrangements “keyed” to customer-specific factors in ways that are simply not possible when service provision is confined to more costly and inflexible Title II common carriage offerings – especially when those offerings are subject to dominant carrier regulation. *Id.* ¶ 88. It “enables parties to a contract to modify their arrangement over time as their respective needs and requirements change without the inherent delay associated with” an

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directly, rather than indirectly through retail tariffing and other regulations that could only *increase* costs and *reduce* broadband competition and innovation.

offering “that must be made available to all.” *Id.* And “through the ability to obtain a new innovative service,” a private carriage option benefits “each party to the commercial arrangement.” *Id.* Put simply, “[t]ailored private contractual agreements, in general, provide service providers more flexibility” to develop new arrangements and to meet evolving and varying customer needs. *Id.* ¶ 72.<sup>20</sup>

The Commission likewise recognized that the *Computer Inquiries* requirements impose onerous burdens that increase carriers’ costs, delay and otherwise impede their delivery of services and deter much-needed broadband investment and innovation. These legacy regulations impede the development of new technologies and services. *Id.* ¶ 65. They prevent the efficient integration of equipment and networks. *Id.* ¶ 67. And they require pointless investment in “duplicative processes” and create other “operational inefficiencies.” *Id.* ¶ 68.

The Commission further acknowledged that imposing Title II regulatory burdens unnecessarily is particularly harmful when those burdens apply only selectively to some providers and not others. For reasons “based on [] history rather than on an analysis of contemporaneous market conditions,” *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2711 (2005), BOCs alone continue to labor under a welter of unique and dated regulations, including dominant carrier regulation (and the attending tariffing requirements), as well as *Computer Inquiries* unbundling and CEI and ONA requirements, that are “inappropriate and unnecessary”

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<sup>20</sup> The Commission has repeatedly recognized the public interest benefits of allowing carriers to retain flexibility to make private carriage offerings. For example, in *AT&T Submarine Systems*, the Commission noted that granting AT&T’s request for private carriage on a submarine cable would permit “negotiations with each of its customers on the price and other terms which would vary depending on the capacity needs, duration of the contract, and technical specifications (e.g., transmission speeds, maintenance levels, restoration ability, and warranty coverage),” and would allow AT&T to make individualized decisions concerning its offers and tailor its offers to the needs of its customers. *AT&T Submarine Sys., Inc.*, 13 FCC Rcd. 21585, ¶ 8 (1998), *aff’d*, *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

in today's marketplace, and that even the most ardent opponents of reform "generally acknowledge . . . are outmoded and should be eliminated or replaced." *Title I Broadband Order* ¶ 42. As the Commission recognized when it removed these obligations for broadband Internet access services, "[r]equiring a single type of broadband platform provider . . . to make available its transmission on a common carriage basis is neither necessary nor desirable to ensure that statutory objectives are met." *Id.* ¶ 79; *see also id.* ¶ 42 ("these rules were adopted based on assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology").

These findings with respect to broadband Internet access services apply with equal or greater force to broadband services used for other purposes. There are few, if any, arenas where it is more important to permit parties maximum flexibility to structure customized arrangements through private contracts than in the provision of broadband services designed to meet the unique needs of individual financial, governmental, educational and industrial organizations whose needs are as varied as their operations. And there are few, if any, arenas where denying carriers and their customers that flexibility and forcing them to structure their relationships within the limiting confines of Title II regulation – particularly selectively applied Title II regulation – is more costly.

By their nature, high capacity broadband arrangements demand tailored offerings, not "cookie cutter" common carrier services that must be made available indiscriminately to all customers. The Commission has long recognized that "enterprises demand extensive, sophisticated packages of services"<sup>21</sup> and are rarely satisfied with "off-the-rack" offerings. Whether they are purchasing legacy frame relay or ATM services or one of the many newer

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<sup>21</sup> *Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 129 (2003).

generation IP-enabled or other high-capacity substitutes, enterprise customers typically purchase customized packages of facilities and associated capabilities that are required to build virtual private networks that meet the unique needs of their particular operations and their specific locations scattered across a city, a region, the nation or the entire world.

These customers, far more than any others, have a wide variety of specialized and demanding requirements for pricing, system integration and accountability, performance and provisioning, and repair and maintenance, as well as a critical need for seamless integration of their broadband services with other networks, services and capabilities. Some customers require a special degree of reliability or protection against latency and negotiate for additional service level agreement guarantees or penalties to cover those contingencies. Others demand shorter remedy intervals for key routes where they have special sensitivities. Some customers demand shorter provisioning intervals. Others want switch or point-of-presence diversity or specialized routing for certain traffic. Some customers negotiate terms under which the supplier will manage all or part of the service or provide specialized monitoring and reporting. And virtually all customers eschew standardized prices in favor of negotiated prices. Thus, the universal marketplace realities are that these broadband customers have widely varying, and often unique, requirements that are not well-served by the inherently generic qualities of common carriage offerings. In this environment, any regulations that inhibit carriers' flexibility to meet customers' specific requirements are undesirable and inefficient.

This is starkly confirmed by the manner in which customers purchase high capacity services. Customers routinely seek competitive bids that respond in great detail to their own specialized requirements. *See SBC-AT&T Merger Order* ¶¶ 74 & n.226, 78; *see also AT&T Non-Dominance Order*, 11 FCC Rcd. 3271, ¶ 65 (1995) (business customers routinely request

proposals from multiple carriers). The enterprise contracts that “result [from these] RFPs and are individually negotiated, . . . are generally for customized service packages.” *SBC-AT&T Merger Order* ¶ 78. Thus, it is clear that broadband customers do not want standardized offerings; rather, they want customized solutions that are tailored to their unique needs, and they typically demand specialized contracts to achieve those solutions.

The intensely individualized nature of these markets is only increasing as next-generation IP-based services and other extremely high-bandwidth services compete with and rapidly replace legacy frame relay and ATM services. “[C]ompetitors are rapidly deploying new IP-based” transmission services, and customers are “increasing[ly]” choosing these services, because they are more flexible, do not depend on any particular technology, and allow even greater customization.<sup>22</sup> Thus, while “legacy” frame relay and ATM services still account for the majority of enterprise broadband transport revenues today, “the number of customers taking Frame Relay is declining, while the number taking IP transmission services is increasing.” *SBC-AT&T Merger Order* ¶ 59; *see also id.* ¶ 59 n.169 (noting slowing growth of ATM and that “as newer technologies emerge, ATM’s role as a backbone technology is changing as enterprise customers increase their use of IP-VPNs”).

In sum, even more than in the Internet access context, “the preferred means of offering wireline broadband transmission services” is “through customized arrangements tailored to the particular needs” of individual requesting customers, and the public interest benefits of a private carriage option are thus even greater than the substantial public interest benefits the Commission recognized for broadband Internet access in the *Title I Broadband Order*. Given the fundamentally individualized nature of these arrangements, artificially limiting carriers to

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<sup>22</sup> *Verizon-MCI Merger Order* ¶ 74 n.223; *SBC-AT&T Merger Order* ¶ 49 & n.167.

common carriage options plainly limits the flexibility of both providers and customers, and it prevents the realization of the same public interest benefits that the Commission found with respect to wireline broadband Internet access services.

It is likewise clear that forcing broadband transport providers to operate within the strictures of the *Computer Inquiries* requirements and Title II – especially the dominant carrier Title II framework – has enormous regulatory costs. With respect to incumbent LECs, in particular, inflexible regulatory compulsion delays and limits the wireline broadband transmission offerings they can make available, and it results in fragmentation of their offerings both across the heavily regulated LECs and their less regulated affiliates and across state and federal jurisdictions. This fragmentation is particularly debilitating in an environment where customers demand unified, end-to-end national, or even international, solutions that competing, but less regulated, providers are free to deliver.<sup>23</sup>

To be sure, wireline broadband providers should continue to have the *option* of providing service on a common carriage basis. Carriers may choose to offer some generic broadband transmission offerings in this fashion, and those offerings would continue to be governed by Title II (although the nondominant carrier framework, including permissive detariffing, should apply to *all* providers, including the BOCs). *See Title I Broadband Order* ¶ 88.<sup>24</sup> But denying

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<sup>23</sup> See, e.g., Letter from Ann D. Berkowitz (Verizon) to Marlene Dortch (FCC), Attachment (“Enterprise Market Presentation”), filed June 23, 2003; *Detariffing Order*, 11 FCC Rcd. 20730, ¶ 53 (1996) (unnecessary tariffing requirements “(1) remov[e] incentives for competitive price discounting; (2) reduc[e] or tak[e] away carriers’ ability to make rapid, efficient responses to changes in demand and cost; (3) impos[e] costs on carriers that attempt to make new offerings; and (4) prevent[] customers from seeking out or obtaining service arrangements specifically tailored to their needs”).

<sup>24</sup> As the *Title I Broadband Order* recognizes, the same marketplace dynamics that so strongly support a ruling that no wireline provider should be compelled to make broadband offerings on a common carriage basis, also strongly support a ruling that any broadband offerings that a provider chooses to offer on a common carriage basis should be subject to nondominant treatment and permissively detariffed. *Title I Broadband Order* ¶ 90. As the Commission held, (continued . . .)

any carrier the option to provide such services on a private carriage basis harms competition, impedes innovation and investment, and deprives customers of very real and substantial public interest benefits.<sup>25</sup>

### III. THE COMMISSION SHOULD REJECT ARIZONA’S PETITION.

Finally, the Arizona Corporation Commission’s Petition makes two arguments, both of which should be rejected. First, Arizona argues that wireline broadband Internet access service should be classified as a telecommunications service in its entirety if it is offered in conjunction with voice over Internet Protocol (“VoIP”). Arizona Pet. at 3-6. The *Title I Broadband Order* squarely and correctly forecloses any such conclusion. The order makes clear that when transmission is offered together with the information processing functions inherent in Internet access, the entire service must be classified as an information service. *See Title I Broadband Order* ¶¶ 14-16. Adding a VoIP capability could only *increase* the information processing capabilities inherent in the service, and thus could not even theoretically transform the entire service back into a telecommunications service. *See id.* ¶ 15 (wireline broadband Internet access is an information service because it “provides end users more than pure transmission”). Moreover, contrary to Arizona’s contention (at 3-5), the Supreme Court’s *Brand X* decision

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(... continued)

although forbearance standards are easily met in these circumstances, a formal forbearance analysis is not necessary to reach this outcome. *See id.* ¶ 91.

<sup>25</sup> AT&T recognizes that allowing carriers the option of providing broadband transmission services through Title I private carriage arrangements could impact universal service funding under current rules. But this short-term issue should not stand in the way of deregulatory relief that will greatly benefit consumers and competition. The Commission has made clear that comprehensive reform of the current universal service contribution regime is a top priority and that there is a growing consensus in favor of a number/connections based approach that would not turn on regulatory classification. The Commission recognized in the *Title I Broadband Order* that, where necessary, it has authority to maintain existing universal service obligations on an interim basis pending comprehensive reform of the new contribution rules. *Title I Broadband Order* ¶¶ 113, 125.

forecloses its proposal. As the Court found, Internet access always involves information processing capabilities, and therefore the Commission has properly classified Internet access as an information service, even when offered “via” the provider’s own telecommunications facilities. *Brand X*, 125 S.Ct. at 2703-05. To hold that the addition of VoIP capabilities could transform the whole into a telecommunications service would create an irreconcilable conflict with *Brand X*.<sup>26</sup>

Second, Arizona seeks reconsideration of the Commission’s fundamental conclusion that providers should have the *option* of offering wireline broadband transmission on a private carriage basis. Arizona Pet. at 6-9. Arizona contends that the Commission appeared to believe that broadband transmission provided to ISPs necessarily exhibit the characteristics that trigger common carrier regulation. *See id.* at 8 (citing *Title I Broadband Order* ¶¶ 74-75). The Commission expressly found otherwise. It held that “[n]othing in the Communications Act compels a facilities-based provider to offer the transmission component of wireline broadband Internet access service as a telecommunications service to anyone,” and it further found that, unless “carriers choose to offer this type of transmission as a common carrier service, . . . we would not expect an ‘indifferent holding out’ but a collection of individualized arrangements.” *Title I Broadband Order* ¶ 103. Accordingly, the Commission’s decision to give providers the option of offering wholesale service on a private carriage basis was consistent with, if not compelled by, well-settled precedent. *See id.* (collecting cases).<sup>27</sup> The Commission’s

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<sup>26</sup> To the extent that Arizona is arguing that VoIP itself should be classified as a telecommunications service, that is not an issue that is appropriately addressed in this proceeding. The Commission is actively considering VoIP classification issues in a separate pending proceeding. *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, ¶¶ 42-44 (2004).

<sup>27</sup> Arizona’s suggestion that wireline broadband carriers may be compelled to offer all services as common carrier services merely because they have traditionally offered some generally available  
(continued . . .)

recognition (¶¶ 74-75) that market forces would provide powerful incentives for wireline broadband providers to seek such private carriage arrangements with ISPs merely bolsters, rather than undermines, that conclusion. In short, Arizona has provided no new reasons or evidence to revisit the Commission’s findings, and the Petition should be rejected.<sup>28</sup>

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(... continued)

common carriage offerings, *see* Arizona Petition at 7 (“[a] particular system is a common carrier by virtue of its functions”), is, as noted above, also foreclosed by precedent. *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

<sup>28</sup> Arizona is also clearly wrong in suggesting that tariffed individual case basis (“ICB”) offerings could serve as an adequate substitute for a private carriage option and would provide carriers with sufficient flexibility “to meet the business needs of each ISP.” Arizona Petition at 8. The Commission has repeatedly held that “carriers may offer services at ICB rates only on an interim basis, pending the tariffing of the service as a generally available offering at averaged rates.” *Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings*, 11 FCC Rcd. 4001 (1995). *See also id.* (ICB service offering “is to be used only as an interim transitional measure” for services for which “the carrier is not experienced,” and carrier must “provide[] cost support” and must “develop[] averaged rates for the service within a reasonable period of time” and make the “service generally available at such averaged rates as soon as they are developed”); *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings, et al.*, 4 FCC Rcd. 8634, ¶ 77 (1989) (“ICB pricing of new services or facilities is not acceptable as a long-term measure”); *Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, 12 FCC Rcd. 10231, ¶ 20 (“ICB offerings are generally intended to be precursors to new service offerings”).

## CONCLUSION

For the foregoing reasons, the Commission should grant Verizon's petition and allow all wireline carriers, in their discretion, to make individualized offerings of wireline broadband transport services to enterprise customers; the Commission should also modify or repeal any *Computer Inquiries* or other existing requirements that would operate to deny any carrier that pro-consumer and pro-competitive flexibility.

Respectfully submitted,

/s/ Gary L. Phillips

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